(1) Supreme Court, U.S.
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No. _____

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1999

RAYMOND FRAZER,
Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the
Supreme Court of the State of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED (Rule 14.1(a))

1. Did the California Legislature's revival of the time-barred criminal case against petitioner, by a retroactive law enacted several years after expiration of the statute of limitations, violate the *Ex Post Facto* Clause?

2. Did the California Legislature's revival of the time-barred criminal case against petitioner, by a retroactive law enacted several years after expiration of the statute of limitations, violate the Due Process Clause?

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PETITION FOR WRIT OF CERTIORARI

Defendant Raymond Frazer respectfully prays that a Writ of Certiorari issue to review the judgment and decision of the Supreme Court of the State of California, entered by opinion issued on August 30, 1999 and modified on October 20, 1999.

I. OPINION BELOW (Rule 14.1(d))

The opinion of the Supreme Court of California (attached as Appendix, Exh. A) was filed on August 30, 1999. It is reported officially at 21 Cal.4th 737, and unofficially at 88 Cal.Rptr.2d 312 and 982 P.2d 180. On October 20, 1999, the California Supreme Court issued an order modifying its opinion, without change in judgment. (Exh. B). It is reported at 21 Cal.4th 867A. Also on October 20, 1999, in an unpublished order (Exh. C), the California Supreme Court denied a timely petition for rehearing.

II. JURISDICTIONAL STATEMENT (Rule 14.1(e))

The opinion of the Supreme Court of California of which petitioner seeks review, reversing the order granting petitioner's demurrer to the information, was filed on August 30, 1999. Exh. A. The opinion was modified without change in judgment on October 20, 1999. Exh. B. Also on October 20, 1999, the Supreme Court of California denied a timely petition for rehearing. Exh. C. This petition is filed under Supreme Court Rule 13.3.

This Court has jurisdiction under 28 U.S.C. § 1257(a).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS (Rule 14.1(f))

United States Constitution, Article I, section 10, clause 1:

"No State shall . . . pass any . . . ex post facto Law . . . ."

United States Constitution, Amendment XIV:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ."

California Penal Code, sections 288(a), 800, 803(g). *See* Appendix, Exhibit G.

IV. STATEMENT OF THE CASE (Rule 14.1(g))

A. Background; Procedural History

Between 1982 and 1996, the statute of limitations for the charged offense of lewd act with a child under 14, Cal. Pen. Code § 288(a), was 6 years. Cal. Pen. Code § 803 [6-year statute for crimes punishable by 8 years or more in prison]; *see* § 288(a) [lewd act with child under 14 punishable by 3, 6 or 8 years].

Effective January 1, 1994, the California Legislature enacted Penal Code section 803(g), which provided a limitations period of one year from the date a person of any age reported to a law enforcement agency that he or she was a victim of a lewd act while under the age of 18 (*inter alia*). Stats. 1993, ch. 390 (A.B. 290), § 1. It was then unclear whether the Legislature intended the new limitations period to apply retroactively. *See People v. Bunn*, 53 Cal.App.4th 227, 230-31, 61 Cal.Rptr.2d 734 (1997).

Effective January 1, 1997, the Legislature again amended section 803(g), making clear that it intended the new limitations period to apply retroactively. Stats. 1996, ch. 130 (A.B. 2014), § 1.

In this case, the Complaint filed on October 21, 1996 charged petitioner with one count of violating Penal Code section 288(a) between October 1, 1984 and December 31, 1984. Clerk's Transcript (CT) 3. On December 5, 1996, defendant filed a demurrer based on the statute of limitations. CT 7. The Municipal Court sustained the demurrer, CT 32 (Exh. E), and dismissed the action. CT 37. The State moved for reconsideration in the Superior Court. CT 38. The Superior Court denied the motion, CT 65 (Exh. F), and denied the request to reinstate the Complaint. CT 68.

The State appealed to the First District Court of Appeal, which affirmed the dismissal on December 22, 1997 in an unpublished opinion. Exh. D. The State's petition for review to the California Supreme Court was granted on March 11, 1998.

On August 20, 1999, in a 4-3 opinion, the California Supreme Court reversed the judgment of the Court of Appeal. Exh. A. Defendant's timely petition for rehearing was denied on October 20, 1999, with a minor change in the opinion. Exhs. B, C.

The Petition for Writ of Certiorari in this case is taken from the decision of the California Supreme Court.

B. Presentation Of The Federal Claims In State Court

Both of the federal claims presented in this petition were decided in an opinion on the merits which constituted a final judgment rendered by the highest state court, the California Supreme Court. *People v. Frazer*, App. A, 21 Cal.4th 737. Petitioner raised both of those federal claims in the State's appeal to the California Supreme Court, in his Respondent's Brief on the merits, specifying the federal nature of the claims and relying on federal constitutional authority. Respondent's Brief on the Merits, at 2-16 [*Ex Post Facto*]; *id.* at 1, 9-10, 15-16 [Due Process].

The State's opening brief in its appeal to the highest state court had not raised a Due Process Clause issue. Under state law, petitioner was permitted to raise that issue in response as grounds for affirmance, and the California Supreme Court was permitted to

consider it. *Belair v. Riverside County Flood Control Dist.*, 47 Cal.3d 550, 568, 253 Cal.Rptr. 693, 764 P.2d 1070 (1988) [reviewing court reviews result, not reasoning, and can affirm on any proper legal ground]; *see United States v. American Railway Express Co.*, 265 U.S. 425, 435 (1924) [similar]. The State agreed the Due Process issue was properly before the Court, and addressed it in its reply brief. Appellant's Reply Brief on the Merits, at 14-31.

Petitioner further addressed the Due Process claim in the California Supreme Court in a timely petition for rehearing, which specified the federal nature of the claim and relied on federal constitutional authority. Petition for Rehearing, at 16-19. The petition for rehearing was denied without opinion. Exh. C.

Both federal claims in this petition were originally raised by petitioner in his demurrer in the Municipal Court, specifying violations of the federal *Ex Post Facto* and Due Process Clauses, and relying on federal constitutional authority for both claims. CT 13-15. The State's request for reconsideration in the Superior Court raised only an *Ex Post Facto* issue; petitioner defended by making the same *Ex Post Facto* and Due Process Clause claims he made in the Municipal Court. CT 56-58. The State's appeal to the Court of Appeal, First Appellate District, again raised only an *Ex Post Facto* issue; petitioner defended on that ground, specifying the federal nature of the claim and relying on federal constitutional authority. Respondent's Brief, at 2-11. As noted above, petitioner raised both the federal *Ex Post Facto* Clause claim and the federal Due Process Clause claim in defending the State's appeal to the California Supreme Court, specifying the federal nature of the claims and relying on federal constitutional authority, and the California Supreme Court decided both of those federal claims on their merits.

V. REASONS FOR GRANTING THE WRIT
(Rules 10, 14.1(h))

This case presents important federal issues on which there are conflicts among state courts of last resort. These issues require resolving ambiguous and possibly contradictory language from this Court's opinions, to determine which state court decisions were decided in a way that conflicts with decisions of this Court.

A. Issue One: *Ex Post Facto*

In *Collins v. Youngblood*, 497 U.S. 37 (1990), this Court held that a change in Texas appellate procedure, allowing an appellate court to affirm the valid portion of a criminal judgment instead of having to reverse the entire judgment when only part was invalid, did not violate the *Ex Post Facto* Clause. The Fifth Circuit had held the contrary, based on language from prior opinions of this Court that retroactive deprivation of any "substantial protection" was prohibited in a criminal case. This Court reversed, holding that the "substantial protection" formulation was amorphous and virtually meaningless, and not a proper statement of the *Ex Post Facto* Clause. 457 U.S. at 44-46.

At some points, the *Youngblood* opinion stated that the *Ex Post Facto* Clause covers only laws that affect either the "definition of a crime," or the amount of punishment for a crime. 497 U.S. at 43, 44, 49; *see also California Department of Corrections v. Morales*, 514 U.S. 499, 504 (1995) [similar language]. The California Supreme Court took these statements literally, in holding a retroactive criminal statute only violates the *Ex Post Facto* Clause if it disadvantages the accused by changing (i) the definition of a crime, or (ii) its punishment. App. A, 21 Cal.4th at 756-57, 759-61, 763, 764 n.26. The Court thus held a Legislature can abolish a fully ripe, complete limitations defense years after the statute's expiration, retroactively stripping the accused of a statutory right to acquittal, because a statute of limitations is not technically part of the "definition of the crime." App. A, 21 Cal.4th at 758-60 & n.22. That reasoning also applies to other complete defenses which would result in acquittal but might not involve the

"definition of a crime," or that ripen only after the alleged crime, such as pardon, amnesty, immunity, and others.

This case thus raises the issue of whether this Court in *Youngblood* intended such a literal use of the phrase "definition of the crime," to permit retroactive abolition of a complete and fully ripe limitations defense which would have resulted in acquittal; or by parity of reasoning, retroactive abolition of other defenses such as pardon, amnesty or immunity which might not involve the "definition of a crime," but which would also result in acquittal.

That issue is of particular importance because other passages in opinions of this Court—including *Youngblood* and *Beazell v. Ohio*, 269 U.S. 167 (1925)—point away from a literalistic "definition of the crime" approach. Recently, this Court cited *Youngblood* as standing for the proposition that "'A law that abolishes an affirmative defense' violates the Ex Post Facto Clause." *Hughes Aircraft Corp. v. United States ex rel. Schumer*, 520 U.S. 939, 948 (1997). In *Youngblood* as well as *Beazell*, this Court referred to deprivation of "any defense previously available" as an *ex post facto* violation. *Youngblood*, 497 U.S. at 42, 49-52; *Beazell*, 269 U.S. at 170. Also in *Youngblood*, this Court—though rejecting the phrase "substantial right" as largely meaningless—still distinguished between "procedural" changes, which usually do not violate the *Ex Post Facto* Clause, 497 U.S. at 46, and "changes in the substantive law of crimes," which do. *Id.* at 45; *see also Landgraf v. USI Film Products*, 511 U.S. 244, 290 (1994) (Scalia, J., concurring in the judgments) [in *Ex Post Facto* jurisprudence, "we have adopted a substantive-procedural line"]. And in *Beazell*, this Court indicated that retroactive abolition of "matter[s] of substance" is an *ex post facto* violation. 269 U.S. at 171. Using these formulations instead of a literal "definition of the crime" formulation, retroactive abolition of a complete limitations defense would more likely be seen as violating the *Ex Post Facto* Clause.

Certiorari should be granted to determine which of this Court's formulations correctly states the *ex post facto* prohibition.

This Court's *Youngblood* opinion also suggested that the four categories enumerated by Justice Chase in *Calder v. Bull*, 3 Dall. (3 U.S.) 386, 390-91 (1798) (opn. of Chase, J.) "define[d] an exclusive list of legislative Acts falling within the constitutional prohibition." *Youngblood*, 497 U.S. at 42, 48-49. The California Supreme Court went a step farther, holding that this Court (1) eliminated one of the four categories and held that the other three were an exclusive list, in *Beazell v. Ohio*, and (2) approved of this new *"Beazell* formulation" in *Youngblood,* while "distill[ing] it into a concise two-part test." App. A, 21 Cal.4th at 754-56 & n.16.

Petitioner's case thus raises the issues of whether this Court really intended to create a separate "*Beazell* formulation" or "*Youngblood* two-part test," and whether either those formulations or the four *Calder* categories are to be construed literally and exclusively. Again, that issue would also affect other defenses, such as pardon, amnesty, and immunity, which might also be difficult to fit into one of these typologies. (This Court is currently considering issues relating to the fourth *Calder* category, in *Carmell v. Texas* (U.S. No. 98-7640, *cert. grd.,* June 14, 1999).)

The issue of exclusivity of the "*Beazell* formulation" or the "*Youngblood* two-part test" is particularly important, because other language in this Court's opinions appears to contradict the California Supreme Court's view that this Court has restricted *ex post facto* violations to fixed categories. In *Calder*, Justice Chase stated that his categories were not exclusive. 3 Dall. at 389, 391, 393. In *Beazell*, this Court stated that it could not "embrace[] within a formula or state[] in a general proposition" which matters of procedure are within the *ex post facto* prohibition; "[t]he distinction is one of degree." 269 U.S. at 171. Most recently, well after *Youngblood*, this Court stated: "We have previously declined to articulate a single 'formula' for identifying those legislative changes that have a sufficient effect on substantive crimes or punishments to fall within the constitutional prohibition . . . ." *California Department of Corrections v. Morales*, 514 U.S. at 509.

The grant of certiorari in *Collins v. Youngblood* allowed this Court to resolve differing and sometimes contradictory

language it had used to describe the proscriptions of the *Ex Post Facto* Clause, and to clarify the content of those proscriptions. *See* 497 U.S. at 45. Certiorari is warranted in this case for the same reason, and to determine if the California Supreme Court's opinion properly characterizes this Court's precedent in the area.

There is a split of authority among national jurisdictions on retroactive revival of time-barred criminal actions. States other than California which have squarely faced the question have held that legislative revival of a time-barred action violates the federal *Ex Post Facto* Clause. *Commonwealth v. Rocheleau*, 404 Mass. 129, 533 N.E.2d 1333 (1989)[1]; *State v. Shedd*, 702 P.2d 267 (Colo. 1985); *Moore v. State*, 43 N.J.L. 203, 214-24 (1881) [cited with approval in *State v. Short*, 131 N.J. 47, 55, 618 A.2d 316 (1993)]; *State v. Sneed*, 25 Tex. 66, 67 (1860) [cited with approval in *Hill v. State*, 146 Tex. Crim. 333, 336, 171 S.W.2d 880, *cert. dismissed*, 320 U.S. 806 (1943)]; *see also State v. Cookman*, 324 Ore. 19, 920 P.2d 1086 (1996) [state Constitution]; *Commonwealth v. Guimento*, 341 Pa. Super. 95, 491 A.2d 166 (1995) [same].

Many other jurisdictions have agreed, often relying on a frequently quoted opinion by Judge Learned Hand, *Falter v. United States*, 23 F.2d 420, 425-26 (2d Cir.), *cert. denied*, 277 U.S. 590 (1928). Despite the widespread reliance on Judge Hand's formulation, the California Supreme Court majority correctly noted that most of these opinions did not squarely face the issue, because the underlying cases had never been time-barred. *See People v. Frazer*, App. A, 21 Cal.4th at 762, 764 n.25 [citing 28 cases].[2]

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[1] *Rocheleau* does not specifically state whether its holding was based on the state or federal Constitution. However, Massachusetts interprets its state *Ex Post Facto* Clause identically to the federal counterpart. *Santiago v. Commonwealth*, 427 Mass. 298, 301, 693 N.Ed.2d 127 (1998). Accordingly, the holding is presumably based on both.

[2] These cases usually involved the different issue of legislative extension of a criminal statute of limitations before it expires. Most opinions hold this is permissible. *See, e.g., United States v. Knipp*, 963 F.2d 839, 844 (6th Cir. 1992); (continued...)

California appears to be the only jurisdiction which has squarely held that Legislative revival of time-barred criminal actions is permissible. *See People v. Frazer*, App. A, 21 Cal.4th at 777, 782 (Kennard, J., dissenting). However, California has some 12 percent of our Nation's population.

In addition, statute of limitations cases in other jurisdictions have construed *Youngblood* as the California Supreme Court did, to require literal use of the phrase "definition of the crime" in *ex post facto* determinations. The California Supreme Court relied on one of those cases, which similarly concluded that retroactive abolition of any criminal limitations defense would not violate the *Ex Post Facto* Clause. *United States v. Knipp*, 963 F.2d 839, 843-44 (6th Cir. 1992) (discussed with approval in *People v. Frazer*, App. A, 21 Cal.4th at 764 n.26). Other cases which construe *Youngblood* the same way, to conclude that no statute of limitations defense is subject to the *Ex Post Facto* Clause, include *United States v. Brechtel*, 997 F.2d 1108, 1113 & n. 13 (5th Cir. 1993); *United States v. Bischel*, 61 F.3d 1429, 1435-36 (9th Cir. 1995); *Christmas v. State*, 700 So.2d 262, 267-68 (Miss. 1997); *United States v. Morgan*, 845 F.Supp. 934, 943 (D. Conn. 1994), *aff'd on other grds.*, 51 F.3d 1105 (2d Cir.), *cert. denied*, 516 U.S. 861 (1995); and *United States v. Cain*, No. 94 CR 483, 1995 U.S. Dist. LEXIS 6319 (N.D. Ill. May 10, 1995), at 3-4. (The facts of these cases involved extension of a statute of limitations before it expired, which is usually held to be permissible. *See supra*, fn. 2.)

Given the split of authority on legislative revival of time-barred criminal actions, and the differing methods of analyzing this issue—with many jurisdictions using Judge Hand's formulation, while others construe this Court's *Youngblood* opinion to require

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[2](...continued)
United States v. Madia, 955 F.2d 538, 539 (8th Cir. 1992). It is not at issue here.

The dissent in the California Supreme Court also quoted approvingly from Judge Hand's *Falter* opinion. App. A, 21 Cal.4th at 776 (Kennard, J., dissenting); *see also id.* at 782 (Brown, J., dissenting) [concurring in Justice Kennard's analysis].

a literal "definition of the crime" approach—certiorari is warranted to resolve this important federal issue.

California's literal "definition of the crime" interpretation of *Youngblood* also creates another conflict among jurisdictions. A literal "definition of the crime" approach means that Legislatures can retroactively eliminate any defense to a criminal charge which ripens only after the (charged) commission of the offense, including defenses such as a pardon, amnesty, or immunity. These defenses, even more than a statute of limitations defense, are difficult to characterize as part of the "definition of the crime."[3]

Other jurisdictions have found an *ex post facto* violation on this type of issue. Apart from the statute of limitations cases above, cases include: *State v. Keith*, 63 N.C. 140, 143-45 (1869) [pardon]; *Day v. City of Clinton* 6 Ill.App. 476, 479-80 (1880) [repeal of statute creating crime, treated as a pardon]; *In re Landsberg*, 14 F. Cas. 1065, 1068 (No. 8,041) (E.D. Mich. 1870) [similar]; *Ex Parte Scales*, 853 S.W.2d 586 (Tex. Ct. Crim. App. 1993) [judicially created immunity from multiple convictions, analyzed under law governing *ex post facto* laws]; and *United States v. Jackson*, 528 A.2d 1211, 1223-24 (D.C. Ct. App. 1987) [judicial overruling of "year and a day rule," analyzed under law governing *ex post facto* laws]. *Cf. Dugger v. Williams*, 593 So.2d 180, 182 (Fla. 1991) [retroactive revocation of eligibility for clemency recommendation invalid as *ex post facto*]. This Court has agreed in dictum, *Cummings v. Missouri*, 4 Wall. (71 U.S.) 277, 329 (1866), but it has never squarely faced this type of issue.

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[3] Cases have referred to the expiration of a criminal limitations period as a form of pardon, immunity or amnesty; for like a pardon, immunity or amnesty, it eliminates all possible consequences of an (alleged) offense. *E.g., State v. Cookman*, 324 Ore. 19; *State v. Carrier*, 822 S.W.2d 623, 624-25 (Tenn. Ct. Crim. App. 1991); *In re Gustavo M.*, 214 Cal.App.3d 1485, 1494, 263 Cal.Rptr. 328 (1989); *Vasquez v. State*, 557 S.W.2d 779, 781 (Tex. Ct. Crim. App. 1977); *Benes v. United States*, 276 F.2d 99, 108 (6th Cir. 1960); *State v. Lafil*, 231 La. 551, 562-63, 92 So.2d 63 (1956); *People v. Hoffman*, 132 Cal.App. 60, 63, 22 P.2d 229 (1933); *In re Doyle*, 257 N.Y. 244, 256, 177 N.E. 489 (1931).

Although historical practice is often important in interpreting constitutional provisions, determining historical practice on retroactive abolition of a criminal limitations defense is problematic, as criminal statutes of limitation were apparently unknown to the common law. *People v. Frazer*, App. A, 21 Cal.4th at 770 n.30; *Vasquez v. State*, 557 S.W.2d 779, 781 (Tex. Ct. Crim. App. 1977); *United States v. Fraidin*, 63 F.Supp. 271, 278-79 (D. Md. 1945). It can be difficult to discern what the Framers thought on a matter that didn't exist when the Constitution was ratified. This difficulty only underscores the need for this Court to resolve the conflicts among jurisdictions, and provide a definitive interpretation of its own *Youngblood* and *Beazell* opinions.

The California Supreme Court's opinion here may also create ripple effects in other important areas of federal law. For example, witnesses historically have been unable to invoke the Fifth Amendment privilege after a statute of limitations expires or after a pardon or grant of immunity, on the ground that such a witness can never be prosecuted. *See, e.g., Hale v. Henkel*, 201 U.S. 43, 67 (1906); *Brown v. Walker*, 161 U.S. 591, 598-99, 627 (1896). But this established rule is open to question under the California Supreme Court opinion, on the ground that prosecution is always possible because the Legislature can retroactively abolish a statute of limitations (or pardon or immunity) whenever it wants. *See generally, e.g., Pillsbury Co. v. Conboy*, 459 U.S. 248, 257, 261 (1983) [Fifth Amendment requires certainty that witness cannot be prosecuted, before he can be compelled to answer]; *Brown v. Walker*, 161 U.S. at 595 [similar]; *In re Doyle*, 257 N.Y. at 250 [similar]; *see also, e.g., Estate of Fisher v. C.I.R.*, 905 F.2d 645, 649 (2d Cir. 1990) [Fifth Amendment privilege does not turn on court's assessment of Government's subjective intent to prosecute, or subjective likelihood of prosecution]. That type of issue is not presented here, but it may have to be faced if the California Supreme Court opinion were to stand.

The issue in this case is far-reaching. The California Supreme Court's view is that under section 803(g), a Legislature can retroactively revive an action that had been time-barred for 5, 10, or 20 years, or even more. Petitioner is aware of one recent case

where the prosecution used section 803(g) to charge a defendant with acts alleged to have occurred in the 1950's, over 40 years ago.[4]

Moreover, the California Supreme Court's opinion is not limited to any one area of law. As a matter of constitutional analysis, a Legislature following this opinion can now lengthen any criminal statute of limitations indefinitely, any time after expiration of the original statute. Such a legislative power impairs the policies served by criminal statutes of limitation as much for innocent defendants as guilty ones. *See, e.g., Toussie v. United States*, 397 U.S. 112, 114-15 (1970); *United States v. Marion*, 404 U.S. 307, 322-23 (1971); *Wilson v. Garcia*, 471 U.S. 261, 271 (1985) [quoting *Adams v. Woods*, 2 Cranch (6 U.S.) 336, 342 (1805)].

This is an issue which will continue to recur, as it is not uncommon for Legislatures to extend criminal limitations periods. In particular, the California Supreme Court's opinion noted that in the late 1980s, Legislatures nationwide began increasing substantially limitations periods for child molestation charges, and applying the increases retroactively. *People v. Frazer*, App. A, 21 Cal.4th at 744 & n.3. The opinion in this case opens the door to all of them as a matter of federal constitutional law, and to revivals of time-barred criminal actions in every other area of law as well.

This Court is currently considering another *ex post facto* issue, involving the fourth category of *Calder v. Bull*, in *Carmell v. Texas* (U.S. No. 98-7540, *cert. grd.*, June 14, 1999). An *amicus curiae* brief filed in *Carmell* argued against petitioner's position here, relying on the California Supreme Court's opinion in this case. *See* Br. of the Amici Curiae States (No. 98-7540), at 12-14. The issue of reviving time-barred actions is not actually before this Court in *Carmell*. Nonetheless, the States' *amicus curiae* brief in

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[4] The case is *People v. Stogner*, Contra Costa County No. 9816224 (1st Appellate Dist. No. A084772). (The defendant in *Stogner* is apparently 72 years old.) The Court of Appeal in *Stogner* followed the California Supreme Court's *Frazer* opinion, and permitted revival of the time-barred action. The case is currently on a petition for review to the California Supreme Court.

Carmell underscores the importance of the issue presented by petitioner, and the conflict in authority on the issue.[5]

This issue provides an excellent opportunity to clarify the scope of the *Ex Post Facto* Clause, in a manner which has not been necessary in prior cases. This Court's precedent makes clear that a retroactive change in mere forms of procedure does not violate the *Ex Post Facto* Clause, while a retroactive change in the "definition of a crime" does. A complete limitations defense falls somewhere in between. Determining *where* in between would likely result in a more complete definition of the scope of the Clause, because this Court has never been faced with this type of issue.

To resolve ambiguities and seeming contradictions in this Court's opinions; to resolve conflicts in authority, which cause substantial numbers of (present or future) defendants who are identically situated in the eyes of the Constitution to receive dissimilar treatment; and to settle an important constitutional issue, this Court should grant certiorari as to Issue One.

B. Issue Two: Due Process

In an oft-quoted passage discussed earlier (*supra*, p. 8), Judge Learned Hand wrote: "Certainly it is one thing to revive a prosecution already dead, and another to give it a longer lease on life. The question turns upon how much violence is done to our instinctive feelings of justice and fair play. For the state to assure a man that he has become safe from its pursuit, and thereafter to withdraw his assurance, seems to most of us unfair and dishonest. But, while the chase is on, it does not shock us to have it extended . . . ." *Falter v. United States*, 23 F.2d at 425-26. Many opinions have quoted Judge Hand's language with approval. *See* cases (28) cited in *People v. Frazer*, App. A, 21 Cal.4th at 764 n.25.

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[5] If Carmell were to prevail, then depending on what this Court's opinion said, the opinion could have an impact on the proper analysis or result here. That would be unlikely, however, if Carmell did not prevail.

Although Judge Hand was writing about the *Ex Post Facto* Clause, language such as "justice and fair play" is often associated with Due Process jurisprudence. *See, e.g., International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945); *Roberts v. State of Maine*, 48 F.3d 1287, 1291 (1st Cir. 1995); *Ouimette v. Moran*, 942 F.2d 1, 13 (1st Cir. 1991). The dissenting Justices in this case agreed with Judge Hand, and concluded that legislative revival of time-barred criminal actions does not comport with fundamental fairness. *People v. Frazer*, App. A, 21 Cal.4th at 776, 780 (Kennard, J., dissenting); *id.* at 782, 784 (Brown, J., dissenting).

This case thus presents the issue of whether Judge Hand was right. The Due Process Clause issue appears to be different from the *Ex Post Facto* Clause issue, because Due Process Clause principles such as vested rights are not determinative in *ex post facto* analysis. *Weaver v. Graham*, 450 U.S. 24, 29-30 & n. 13 (1981); *but cf. Landgraf v. USI Film Products*, 511 U.S. at 291 (Scalia, J., concurring in the judgments ["The upsetting of 'vested substantive rights' [is] the proper touchstone . . . for interpretation of the United States Constitution's *Ex Post Facto* Clauses."])

The issue is particularly acute in California and other jurisdictions like it, which view a criminal statute of limitations as a substantive protection rather than a mere procedural device. The law in California has long been that a criminal statute of limitations is a substantive protection rather than merely procedural, *People v. Zamora*, 18 Cal.3d 538, 547, 134 Cal.Rptr. 784, 557 P.2d 75 (1976), and that "[i]n criminal cases, the state, through its Legislature, has declared [in statutes of limitation] that it will not prosecute crimes after the period has run . . . ." *People v. McGee*, 1 Cal.2d 611, 613, 36 P.2d 378 (1934); *People v. Morris*, 46 Cal.3d 1, 13, 249 Cal.Rptr. 119, 756 P.2d 843 (1988). A California criminal statute of limitations is so substantive that it can be raised at any time, before or after judgment, including for the first time on appeal or habeas corpus. *Cowan v. Superior Court*, 14 Cal.4th 367, 371-72, 58 Cal.Rptr.2d 458, 926 P.2d 438 (1997); *In re Demillo*, 14 Cal.3d 598, 601, 121 Cal.Rptr. 725, 535 P.2d 1181 (1975).

From a perspective of fundamental fairness, legislative revival of a time-barred criminal action—particularly in a jurisdiction such as California where a criminal statute of limitations is substantive and not merely procedural—amounts to the State promising that it would not prosecute a particular charge, *see People v. McGee*, 1 Cal.2d at 613; *People v. Morris*, 46 Cal.3d at 13, and then reneging on the promise many years later. The dissenters in the California Supreme Court agreed. *People v. Frazer*, App. A, 21 Cal.4th at 781, 782 (Kennard, J., dissenting); *id.* at 782, 783 (Brown, J., dissenting). The question here is whether that violates the federal Due Process Clause.

If these considerations are not dispositive, then petitioner also asks this Court to reconcile two lines of its Due Process Clause cases, which date back to the 19th century; have not been reconciled by this Court; and have drawn differing views from lower courts. The California Supreme Court relied on this Court's opinion in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945), to reject petitioner's Due Process claim. *People v. Frazer*, App. A, 21 Cal.4th at 766-69. That raises the issue of whether the California Supreme Court interpreted *Chase Securities* correctly.

The line of this Court's authority which supports petitioner includes *Davis v. Mills*, 194 U.S. 451, 456-57 (1904); *Stewart v. Keyes*, 295 U.S. 403, 417 (1935); and *William Danzer & Co. v. Gulf & S.I.R. Co.*, 268 U.S. 633 (1925). These and similar cases recognize a constitutionally protected interest upon the expiration of a "substantive" (as opposed to procedural) limitations period, one that extinguishes the right rather than merely barring a remedy. The two most common examples are limitations periods regarding title to real or personal property (*Stewart v. Keyes*), and limitations periods which substantively qualify a statutory enactment (*Davis v. Mills, William Danzer*). In both situations, the expiration of a statute of limitations—sometimes also called a statute of repose—is said to destroy the right rather than merely barring the remedy, creating a vested right which cannot be divested by retroactive legislation. *Davis v. Mills*, 194 U.S. at 456-57; *William Danzer*, 268 U.S. at 636-37; *Stewart v. Keyes*, 295 U.S. at 417. In California, a criminal statute of limitations is a substantive

limitation on the power to prosecute, *supra*, p. 14, which always substantively qualifies a statutory enactment because all crimes in California are statutory. Cal. Pen. Code, § 6; *In re Brown*, 9 Cal.3d 612, 624, 108 Cal.Rptr. 465, 510 P.2d 1017 (1973); *People v. Frazer*, App. A, 21 Cal.4th at 781-82 (Kennard, J., dissenting).

The cases where this substantive limitations (statute of repose) analysis applies are in contrast with the usual federal rule, that expiration of a typical procedural statute of limitations—as on a claim for a debt—creates no vested rights. *Chase Securities v. Donaldson*, 325 U.S. 304; *Campbell v. Holt*, 115 U.S. 620 (1885).

Chase Securities, the case on which the California Supreme Court relied here, declined to apply cases such as *Davis v. Mills* or *William Danzer* to its facts or legal claim. However, *Chase Securities* did not overrule or limit *Davis v. Mills* or *William Danzer* in their own context, and in fact it appears to have approved of those cases in their own context. *Chase Securities*, 325 U.S. at 312 n.8; *see Smith v. Westinghouse Electric Corp.*, 266 Md. 52, 56, 291 A.2d 452 (1972); *Kelly v. Marcantonio*, 678 A.2d 873, 883 (R.I. 1996). *Chase Securities* is clearly applicable in its own context as well. The question is whether that is the context of this case, and how one goes about telling the difference.

Lower courts disagree on the vitality and meaning of the "substantive right" line of cases. Some courts, holding that this Court recognized a Fourteenth Amendment interest in cases such as *Davis v. Mills* and *William Danzer*, have held the federal Due Process Clause prohibits retroactive abolition of a complete defense based on a "substantive" statute of limitations. *Colony Hill Condominium I Ass'n v. Colony Co.*, 70 N.C. App. 390, 394, 320 S.E.2d 273, 276 (1984), *rev. den.*, 312 N.C. 796, 325 S.E.2d 485 (1985); *Cole v. Alodex Corp.*, 533 F.2d 372, 374 (8th Cir. 1976), *aff'g In re Alodex Securities Litigation*, 392 F.Supp. 672, 680-81 (S.D. Iowa 1975); *Smith v. Westinghouse Electric Corp.*, 266 Md. at 55-57; *Haase v. Sawicki*, 20 Wis.2d 308, 317, 121 N.W.2d 876 (1963); *see also Kurzawa v. Jordan*, 146 F.3d 435, 437 (7th Cir. 1998) [in dictum: "Because criminal statutes of limitations . . . are more analogous to civil statutes of repose, [defendant's] *William*

Danzer argument might be valid if we were dealing with the retroactive extension of a lapsed statute of limitations."]

Other courts have rejected the "substantive right" cases as outmoded. *Shadburne-Vinton v. Dalkon Shield Claimants Trust*, 60 F.3d 1071, 1074-1076 (4th Cir. 1995), *cert. denied*, 516 U.S. 1184 (1996); *Wesley Theological Seminary v. United States Gypsum Co.*, 876 F.2d 119, 121-22 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990); *Nachtsheim v. Wartnick*, 411 N.W.2d 882, 887-88 (Minn. Ct. App. 1987); *Independent School Dist. No. 197 v. W. R. Grace & Co.*, 752 F.Supp. 286, 296-298 (D. Minn. 1990). This Court has not squarely addressed the issue of whether or how to reconcile the two lines of opinions (*Chase Securities/Campbell v. Holt*, and *Davis v. Mills/William Danzer*).

For all of these reasons, certiorari should be granted on Issue Two.

ARGUMENT

I. Retroactive Abolition Of Petitioner's Complete Limitations Defense Violated The *Ex Post Facto* Clause

In focusing exclusively on "definition of the crime" language in this Court's *Youngblood* opinion, the California Supreme Court eschewed several of this Court's broader formulations of the *ex post facto* prohibition, in cases beginning with *Calder* and continuing after *Youngblood.* Petitioner quoted several of those formulations *supra*, pp. 6, 7.

These broader formulations establish that this Court has not required an *ex post facto* analysis anywhere near as narrow as the California Supreme Court believed. Nor has this Court held that only narrow portions of its language are an exclusive list of all possible *ex post facto* violations. This Court held again recently—as it has before—that it has never articulated a single "formula" for determining what penal legislation is proscribed as

ex post facto. *California Department of Corrections v. Morales*, 514 U.S. at 509; *accord Beazell v. Ohio*, 269 U.S. at 171.

These conclusions also follow from viewing this Court's *Youngblood* and *Beazell* opinions through a lens of common sense. In *Youngblood* and *Beazell*, the claimed *ex post facto* laws were purely matters of procedure, *i.e.*, mechanics of the adjudicative process—in *Youngblood*, a change in appellate procedure dealing with disposition after a partial reversal; and in *Beazell*, a change in procedure permitting consolidation of trials for good cause. The other criminal case opinions before *Youngblood* in which this Court found there to be no *ex post facto* violation (including the two opinions which *Youngblood* overruled) were to similar effect.

None of this Court's opinions has done anything as extraordinary as the California Supreme Court did in this case, permitting the Legislature to eliminate a complete right to an acquittal by retroactive legislation. Certainly, neither *Youngblood* nor *Beazell* did so, either expressly or by implication.

While the holdings of *Youngblood* and *Beazell* were 100 percent correct, the language of those opinions should be construed with reference to the actual cases that were before this Court. "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *Cohens v. Virginia*, 6 Wheat. (19 U.S.) 264, 399 (1821) [quoted in, *e.g.*, *Zenith Radio Corp. v. United States*, 437 U.S. 443, 462 (1978)]. *Youngblood* and *Beazell* involved mere alterations in modes of procedure, not elimination of a complete legal defense which would have resulted in acquittal.

Here by contrast, in the words of *Beazell*, 269 U.S. at 170, "[t]he quantum and kind of proof required to establish guilt, and all questions which may be considered by the court and jury in determining guilt or innocence," have not "remain[ed] the same." In California, the prosecution always has the burden of proving compliance with the statute of limitations. If the prosecution fails to meet that burden of proof, the trier of fact must return a verdict of not guilty. *People v. Zamora*, 18 Cal.3d 538, 565 n.27, 134

Cal.Rptr. 784, 557 P.2d 75 (1976); *People v. Angel*, 70 Cal.App.4th 1141, 1146-47, 83 Cal.Rptr.2d 222 (1999). Between 1990 and 1997, a jury would have had to find petitioner not guilty on this ground alone; but in 1997, the Legislature retroactively abolished that right to an acquittal. This is a far cry from the mere procedural alterations in *Youngblood* and *Beazell*.

In taking the language "definition of a crime" literally, the California Supreme Court and the other courts which have done the same, *see supra*, p. 9, have used what might be called a "definitional" approach, *i.e.*, that what the California Supreme Court called the "*Beazell* formulation" or "*Youngblood* two-part test" specifically defines every law forbidden as *ex post facto*. *People v. Frazer*, App. A, 21 Cal.4th at 756-57, 760, 763-64. This Court, however, has never adopted such a restrictive approach. As noted above, this Court has stated a functional rather than a definitional approach in its *Ex Post Facto* Clause jurisprudence, and has not limited *ex post facto* analysis to fixed, immutable categories. *See Beazell v. Ohio*, 269 U.S. at 171; *California Department of Corrections v. Morales*, 514 U.S. at 509; *see generally supra*, pp. 6, 7. This Court has used a similarly functional approach in two areas closely related to the *Ex Post Facto* Clause, and has similarly eschewed arguments that these areas should be analyzed through fixed, limited categories. *See Nixon v. Administrator of General Services*, 433 U.S. 425, 475-76 (1977) [Bill of Attainder Clause]; *Hughes Aircraft Co. v. United States*, 520 U.S. 939, 947 (1997) [civil statutory retroactivity]; *Landgraf v. USI Film Products*, 511 U.S. 244, 268-69 & n.23 (1994) [same].

By its overly narrow interpretation of *Youngblood* and *Beazell*, the California Supreme Court adopted what it admitted was a "technical view" of the *ex post facto* prohibition. *People v. Frazer*, App. A, 21 Cal.4th at 763 n.24. This Court has not, however, viewed the *Ex Post Facto* Clause as a mere "technical" provision. Far from it: "The *Ex Post Facto* Clause flatly prohibits retroactive application of penal legislation," as part of a presumption against retroactive laws that "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our republic." *Lynce v. Mathis*, 519 U.S. 433, 439 & n.12 (1997).

James Madison called *ex post facto* and similar laws "contrary to the first principles of the social compact, and to every principle of sound legislation." The Federalist No. 44 [quoted in *Landgraf v. USI Film Products*, 511 U.S. at 267 n.20].

As discussed *ante*, p. 6, this Court has recognized that "a law that abolishes an affirmative defense," and a retroactive change in a substantive penal law, violate the *Ex Post Facto* Clause. Retroactive abolition of a fully ripe and complete limitations defense, and of the consequent right to an acquittal, is both.

In this case, to use the words of *Beazell*, a 6-year statute of limitations defense was "available under the laws in force at the time of the [alleged] commission" of the offense, late 1984. Granted, at the time of the alleged offense it was only a contingent defense as to petitioner, which wouldn't become noncontingent unless and until the applicable limitations period expired. But the limitations period did expire, and the defense did become noncontingent and unconditional. The 6-year statute of limitations was, by law, a defense existing at the time of the charged offense, which could not be abolished as to petitioner after it became noncontingent and fully ripe. *Cf. Kring v. Missouri*, 107 U.S. 221, 247 (1883) (Matthews, J., dissenting) [legislative repeal of pardon was impermissible *ex post facto* law; but if pardon had been conditional, and had been repealed before all conditions had been satisfied, repeal would not be *ex post facto*].

This Court has recognized the primary concern of the *Ex Post Facto* Clause, that "retroactive punitive measures may reflect 'a purpose not to prevent dangerous conduct generally, but to impose by legislation a penalty against specific persons or classes of persons.'" *Landgraf v. USI Film Products*, 511 U.S. at 267 n.20 [quoting *James v. United States*, 366 U.S. 213, 247 n.3 (1961) (Harlan, J., concurring in part and dissenting in part)]. "The *Ex Post Facto* Clause not only ensures that individuals have 'fair warning' about the effect of criminal statutes, but also 'restricts governmental power by restraining arbitrary and potentially vindictive legislation.'" *Landgraf*, 511 U.S. at 266-67. Many other opinions of this Court also emphasize the Framers' desire to

restrain government and curtail legislative abuses as a key reason for this Clause. *E.g., Miller v. Florida*, 482 U.S. 423, 429-30 (1987); *United States v. Brown*, 381 U.S. 437, 444 n.18 (1965) [quoting James Madison, The Federalist No. 44]; *Fletcher v. Peck*, 6 Cranch (10 U.S.) 87, 137-38 (1810); *Calder v. Bull*, 3 Dall. at 389 (opn. of Chase, J.), 396 (opn. of Paterson, J.), 399-400 (opn. of Iredell, J.). *See also People v. Stevenson*, 416 Mich. 383, 398, 331 N.W.2d 143 (1982) ["[A]ctual or even fictional reliance is not the sole interest protected .... The *ex post facto* principle also protects against erratic or arbitrary action improper in a lawgiver."]; *Warren v. United States Parole Commission*, 659 F.2d 183, 187 (D.C. Cir. 1981) [most significant reason for the *ex post facto* prohibition is to curtail legislative abuses], *cert. denied*, 455 U.S. 950 (1982).

These types of concerns apply to retroactive abolition of any complete defense which otherwise would have resulted in acquittal.[6] Elimination of a complete pardon, immunity or statute of limitations defense is as much a potential means of legislative abuse as abolition of an insanity defense. (If anything, the Framers would have been more concerned about the former. Those legislative practices would have been far more susceptible of retributive abuses than a change in law affecting only politically powerless people in insane asylums.)

The California Supreme Court focused on only one concern of the *Ex Post Facto* Clause, reliance/fair warning. It stated that the intent of the *Ex Post Facto* Clause was to "ensure[] the citizenry has 'fair warning' of the conduct proscribed by law and of the penalties imposed for violating those proscriptions. .... In this way, individuals are free to act in reliance on the law without fear that their conduct will be made punishable in a 'vindictive' or 'arbitrary' fashion after it has occurred." *People v. Frazer*, App. A, 21 Cal.4th at 754. The Court later elaborated: "Statutes governing

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[6] They also seem particularly *à propos* in a case such as this, where the retroactive legislation singled out one group of persons who had never been convicted of or even charged with a particular crime, based on the nature of the alleged crimes with which they might later be charged.

the time at which a future criminal action may be filed are not enactments on which defendants may reasonably rely in deciding whether to commit an act otherwise defined as criminal . . . ." 21 Cal.4th at 771. These overly narrow recitals of the Clause's purposes yielded an overly narrow view of its scope.

Moreover, the California Supreme Court's reliance theory proves too much, because so many matters of proof that clearly implicate the *ex post facto* prohibition are not based in reliance. For example, defenses such as entrapment, insanity or mistake are not "reliance" defenses; indeed, they often *preclude* any showing of reliance. Yet these non-reliance defenses fall under the *Ex Post Facto* Clause. *Youngblood*, 497 U.S. at 49. There are even some "definitions of crimes" that lack a reliance component, such as involuntary manslaughter, which is generally committed without intent and thus without reliance. Cal. Pen. Code, § 192(b). Yet they too come under the *ex post facto* prohibition. And in most cases, convicted criminals do not actually rely on the elements of any given crime or punishment, because few criminals stop to read statutes and caselaw before committing their crimes. In short, reliance on the definition of a crime or punishment is far from the only interest served by the *Ex Post Facto* Clause, and is not a principled basis to limit that Clause's scope.

Beyond that, criminal statutes of limitations also serve reliance interests. As one very common example, taxpayers often limit retention of tax and financial records to 6 years, the maximum federal criminal statute of limitations. 26 U.S.C. § 6531. (Do taxpayers now need to keep records forever, on the ground that a state or federal Legislature can always extend or abolish the statute of limitations?) As the dissenting Justices in this case put it:

> Statutes of limitations tell people when they no longer need to fear prosecution for crimes which they may or may not have committed. After a statute of limitations for a crime has run, all persons, guilty or innocent, having any reason to anticipate that they might have been subject to prosecution for that crime may throw away

> documents or other items that might have been useful to support a defense, secure in the belief that prosecution is no longer a possibility. Because the self-incrimination privilege does not survive an expired statute of limitations, a person may be forced to testify about a crime in civil proceedings held long after the statute of limitations for the crime has expired. (Fn: Such testimony is particularly likely when the alleged molester is a parent or stepparent. False allegations of child molestation are a not-uncommon phenomenon in bitterly contested child custody proceedings.)

People v. Frazer, App. A, 21 Cal.4th at 780-81 & n.2 (Kennard, J., dissenting). Thus, even if reliance were the only interest underlying the *Ex Post Facto* Clause, which it clearly isn't, that interest encompasses complete limitations defenses as well as other affirmative defenses or "definitions of crimes."

The California Supreme Court thought it significant that a limitations defense accrues only after the alleged commission of an offense, rather than at the time of alleged commission. *People v. Frazer*, App. A, 21 Cal.4th at 763. It is not, for the reasons above.

Moreover, this Court recently rejected such a distinction in *ex post facto* analysis. In *Lynce v. Mathis*, 519 U.S. 433 (1997), Florida made a similar claim, that it could cancel overcrowding credits because Lynce could not reasonably have expected to receive them when he pled *nolo contendere* (*i.e.*, he could not have relied on them). This Court rejected the claim, on the ground that Florida had actually issued the credits, so the retroactive law substantively disadvantaged Lynce by leading to his rearrest and further incarceration. 519 U.S. at 446-47. In *Lynce*, the substantive right existing at the time of the offense—one which affected the State's power of punishment—may have been only contingent at

that time; but once it later became complete and fully ripe, it could not be abolished retroactively. This case should be no different.[7]

In any event, petitioner would submit that—especially in California, and other jurisdictions where a criminal statute of limitations is substantive—retroactive abolition of a complete limitations defense is within at least two of the *Calder v. Bull* categories, the third and fourth. (The third category is included in the California Supreme Court's "*Beazell* formulation" and "*Youngblood* two-part test.") Retroactive abolition of petitioner's complete limitations defense inflicted a greater punishment than the law annexed to the crime when allegedly committed, because under that law, a fully ripe 6-year limitations defense meant the crime could not result in any punishment at all. And retroactive abolition of the complete limitations defense altered the rules of evidence to permit conviction on less or different testimony than the law required at the time of the alleged offense, because evidence of compliance with a 6-year limitations period was required at that time (and continuously after, until the defense became complete), but was not required under the retroactive law. None of this should matter, however, because the *ex post facto* violation is manifest without any reference to fixed categories.

In the end, petitioner seeks a construction of the *Ex Post Facto* Clause that is practical and well grounded in authority, instead of the overly selective and ill-founded construction proffered by the California Supreme Court. Petitioner asks this Court to grant certiorari on Issue One, and reverse the judgment.

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[7] Recently, this Court faced a similar claim in a civil context. The plaintiff claimed the presumption against statutory retroactivity didn't apply to abolition of a defense to *qui tam* actions, because it didn't (i) create a new cause of action or change an existing one, or (ii) increase the defendant's exposure to damages. *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. at 946. This Court rejected the claim, on the ground that the statutory amendment eliminated a defense—which, notably, was another defense that didn't go to the "definition of the [tort] offense" and didn't exist at the time of the alleged wrongful acts. *Id.* at 947-50. The plaintiff's constitutional retroactivity claim in this case should meet with the same fate, for similar reasons.

II. Retroactive Abolition Of Petitioner's Complete Limitations Defense Violated The Due Process Clause

A. Fundamental Fairness

Petitioner certainly concurs with Judge Hand's conclusion. *Falter v. United States*, 23 F.2d at 425-26. He also concurs with the three California Supreme Court Justices who dissented here: "The State of California has an obligation to deal fairly with its citizens. Once it has made an absolute and irrefutable assurance that it will not initiate a prosecution, it may not renege on that promise years afterwards, when memories may have faded and evidence may have been destroyed." *People v. Frazer*, App. A, 21 Cal.4th at 781, 782 (Kennard, J., dissenting); *id.* at 784 (Brown, J., dissenting). Though the dissenters' conclusions of fundamental unfairness rested on the state Due Process Clause, fundamental unfairness equally describes a Fourteenth Amendment violation.

If anything, this should apply with particular force in a jurisdiction such as California, where a criminal statute of limitations is considered substantive; or more importantly, was considered substantive at the time petitioner's statute expired. Our laws since the beginning of the Republic have strongly militated against retroactive legislative deprivation of substantive rights. *See, e.g., Landgraf v. USI Film Products*, 511 U.S. at 265-67.

Until the opinion in this case, the California criminal statutes of limitation put California's citizens on notice that they were potentially subject to prosecution for a certain period of time, and no more. Now, California has deemed that the prior notice doesn't matter for charges of child molestation, and further, that no statute of limitations means what it says because the Legislature can always change it after the fact. What are California's citizens supposed to do? Must they forever keep their tax, financial, and professional records and other contemporaneous documents, now "knowing" that any statute of limitations can be changed at will?

No state is required to adopt criminal statutes of limitation. But if a state does, the law should mean what it says. "To hold otherwise would allow for a dangerous precedent where any limitations period can be rewritten retroactively, thus making the purpose of statutes of limitations meaningless." *State of Minnesota ex rel. Hove v. Doese*, 501 N.W.2d 366, 370 (S.D. 1993). A criminal statute of limitations is supposed to provide predictability, and an irrebuttable presumption of finality beyond a set limit. *United States v. Marion*, 404 U.S. at 322-23. The California Supreme Court opinion permits Legislatures to destroy both at will.

This Court has called retroactive repeal of an immunity "subversive of principles of right and justice." *Cameron v. United States*, 231 U.S. 710, 719 (1914). Retroactive repeal of a substantive statute of limitations, effectively an immunity by operation of law, should be no different in the eyes of the law.

B. "Substantive" And "Procedural" Statutes Of Limitation

With respect to the caselaw, and the issue of "substantive" vs. "procedural" statutes of limitations: Despite criticism in cases such as those cited *supra*, p. 17, this Court has never overruled its cases finding a constitutional violation in post-time bar repeal of a substantive limitations defense, such as *Davis v. Mills* or *William Danzer*. Nor has it placed the restrictions on those cases that some suggest. They remain good authority in their own context, which deals solely with statutes of limitation that are "substantive," *i.e.*, that extinguish a right rather than merely barring a remedy.

The existence of substantive statutes of limitation that qualify rights (in some states, even contract or tort rights), by extinguishing the right at the time bar, was well known to the Anglo-American system when the Constitution was ratified. *See, e.g., Pritchard v. Norton*, 106 U.S. 124, 131-32 (1882); *Baker v. Stonebraker*, 36 Mo. 338, 349-50 (1865). That was and is how many states characterize their statutes of limitation. *See State of Minnesota ex rel. Hove v. Doese*, 501 N.W.2d at 369-70; *People v. Frazer*, App. A, 21 Cal.4th at 779 (Kennard, J., dissenting), and cases cited. That is their prerogative, as this Court held in *Chase*

Securities, 325 U.S. at 312-13 & n.9. This Court recently recognized a substantive statute of limitations enacted by Congress in *Beach v. Ocwen Federal Bank*, 523 U.S. 510, 516-17 (1997).

These types of statutes were common with respect to real or personal property. This Court recognized one in the early cases of *Shelby v. Guy*, 11 Wheat. (24 U.S.) 361 (1826) and *Brent v. Chapman*, 5 Cranch (9 U.S.) 358 (1809). But these statutes were not confined to real or personal property. Under these statutes, a defendant acquired a vested right at the time bar; not due to any theory of reliance, but simply because the jurisdiction that created the right considered the claimant's right extinguished at the time bar. That vested a right in the defendant to be free from a claim (effectively a type of immunity), rather than merely depriving the claimant of a remedy. *See, e.g., Baker v. Stonebraker*, 36 Mo. at 349-50 [construing a 1715 statute on enforcement of judgments]; *Pittsburgh, Cincinnati & St. Louis Ry. Co. v. Hine*, 25 Ohio St. 629, 633-34 (1874) [wrongful death action]; *Brown v. Parker*, 28 Wis. 21, 27-33 (1871) [contract action]; *Pritchard v. Norton*, 106 U.S. at 130-32; *see also Walsh v. Mayer*, 111 U.S. 31, 37 (1884).

This Court made clear in *Campbell v. Holt* and *Chase Securities* that the Fourteenth Amendment does not *per se* prohibit retroactive revival of time-barred actions; a (procedural) statute of limitations that goes only to remedy can always be changed. But in jurisdictions where a statute of limitations is considered to extinguish a right rather than merely barring a remedy, expiration of that type of limitations period creates a substantive right for the defendant. Deprivation of that right is thus recognized as violating state and federal Due Process guarantees. *State of South Dakota ex rel. Dotson v. Serr*, 506 N.W.2d 421, 423 (1993); *Cole v. National Life Ins. Co.*, 549 So.2d 1301, 1307 (Miss. 1989); *Country Mutual Ins. Co. v. Knight*, 40 Ill.2d 423, 427, 240 N.E.2d 612 (1968); *Ackerman v. Ackerman*, 42 Va. Cir. 103, 107 (1997).

That is the principle for which this Court's opinions such as *Davis v. Mills*, *William Danzer*, and *Stewart v. Keyes* stand. Retroactive abolition of a complete limitations defense is not *per se* a violation of the Fourteenth Amendment, as *Campbell v. Holt*

and *Chase Securities* make clear. But the latter two cases involved statutes of limitations which were deemed procedural, and only to bar the remedy, by the jurisdiction which created the underlying right. "[C]ertainly it cannot be said that lifting the bar of a statute of limitations so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment. *Chase Securities*, 325 U.S. at 314 [emphasis added].

By contrast, when the jurisdiction which creates the right also construes the accompanying statute of limitations as "substantive" and as qualifying the right, so that expiration of the time bar extinguishes the right, that is when cases such as *Davis v. Mills*, *William Danzer* and *Stewart v. Keyes* apply. In those jurisdictions, retroactive abolition of a "substantive" statute of limitations is a violation of the federal Due Process Clause.

This Court has held that whether a statute of limitations is substantive as opposed to procedural, and thus destroys the underlying right rather than merely withdrawing a remedy, depends on the intent of the legislature. *Mid-State Horticultural Co. v. Pennsylvania Ry. Co.*, 320 U.S. 356, 360-61 (1943); *Beach v. Ocwen Federal Bank*, 523 U.S. at 416-17; *see Chase Securities*, 325 U.S. at 312 n.8 [basing its holding on how "the state court . . . construed the relationship between its limitation acts and the state law creating the asserted liability"]. That is the factor which this Court used in *Chase Securities* to distinguish a typical procedural statute of limitations (*Campbell v. Holt/Chase Securities*), from substantive statutes of limitation (*Davis v. Mills/William Danzer*).[8]

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[8] It also distinguishes some of this Court's recent cases, such as *International Union of Electrical, Radio and Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 243-44 (1976), and *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 18 (1976). In *Robbins & Myers*, retroactive repeal of a time bar was held to be permissible, when there was no indication Congress intended the bar to be substantive. *Turner Elkhorn* held that presumptions in economic legislation must be rational, which is clearly true but doesn't affect the issue here, since not even a rational violation of the Due Process Clause is permissible. These cases do not support the broad theory in cases such as *Shadburne-Vinton*, (continued...)

Chase Securities, 325 U.S. at 312 n.8, 314; *see Davis v. Valley Distributing Co.*, 522 F.2d 827, 830 & n.7 (9th Cir. 1975), *cert. denied*, 429 U.S. 1090 (1977); *Chevron Chemical Co. v. Superior Court*, 131 Ariz. 431, 439-40, 641 P.2d 1275 (1982). That makes sense, since protected Fourteenth Amendment liberty and property interests find their source in the law of the jurisdiction that creates them. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

Determining whether a statute of limitations is "substantive" or "procedural" is not always easy. Here, however, it is not a problem. It is well established that a California criminal statute of limitations is substantive, and was when petitioner's 6-year time bar—and thus the State's right to prosecute—expired in 1990. *People v. McGee*, 1 Cal.2d at 613-14; *People v. Morris*, 46 Cal.3d at 13; *People v. Zamora*, 18 Cal.3d at 547.

This issue requires looking to the Legislature's intent in enacting the original limitations period. The issue is whether a substantive right inhered in the original legislation (section 800), not in the repealing legislation (section 803(g)); for if a right created in the original legislation vested at the time bar, no later repealing legislation could "undivest" it.[9] In this case, the issue must be examined as of 1990, when the 6-year statute expired, and thus when any right to repose vested. *See People v. Frazer*, App.

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[8](...continued)
see supra, p. 17, that there are no Due Process consequences to repeal of any complete time bar, whether substantive or procedural.

[9] Also, prior to 1990, the Legislature understood that retroactive revival of time-barred criminal actions would violate *ex post facto* prohibitions. *See* Law Revision Commission Comment to Cal. Pen. Code § 805.5 (1984 enactment). The Legislature rewrote California's criminal statute of limitations laws in 1984, and in so doing, it would not have intended those statutes to have a meaning it believed to be unconstitutional. *In re Rights to Waters of Long Valley Creek Stream System*, 25 Cal.3d 339, 349, 158 Cal.Rptr. 350, 599 P.2d 656 (1979). In 1999, the California Supreme Court declared there was no constitutional prohibition against retroactive revival of time-barred criminal actions. But the issue is what the California Legislature intended by enacting statutes of limitation up to 1990, not what it was permitted to do in 1997 or 1999.

A, 21 Cal.4th at 783 (Brown, J., dissenting). The 1990 expiration of the substantive statute of limitations implicates the substantive right line of authority. The Legislature's effort to undo that substantive right seven years later violated the Due Process Clause.

It doesn't matter that a government is not required to make a particular statute of limitations substantive rather than procedural. Once it does, a right to repose vests when the statute expires. The government cannot then take it away. *See Moore v. State*, 43 N.J.L. at 227-29 (opn. of Chancellor Runyon). No more can a government give a conditional gift of $50, allow the condition to be perfected thus making the gift unconditional, then retroactively revoke the gift. The donee need not show he relied on the gift, or collected it as soon as it became unconditional, or even that he has any use for the money. He has a right to it when the last condition is fulfilled. *Twenty Per Cent Cases*, 20 Wall. (87 U.S.) 179, 187 (1873). As a matter of constitutional analysis, this case is no different.

For all of the reasons in this section and in section (A) above, this Court should grant certiorari and hold that retroactive application of section 803(g) violated the Due Process Clause.

CONCLUSION

For all of the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Dated this 3rd day of January, 2000.

Respectfully submitted,

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